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No. 73-772

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

DALY AND OTHERS,

Petitioners,

vs.

NATURAL RESOURCES BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

JOSEPH F. PRELOZNIK
MARY VAN GEMERT
520 University Avenue
Madison, Wisconsin 53703
Counsel for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners, Shirley Daly, et al., pray that a writ of certiorari issue to review the final judgments of the Supreme Court of the State of Wisconsin, entered in this case on June 29, 1973 and August 28, 1973.

OPINIONS BELOW

The unreported findings of facts, conclusions of law and permit for construction of the dam issued by the Wisconsin Department of Natural Resources, appear post, pages 54-67, Appendix D. The unreported opinion of the Trial Court appears post, pages 18-51, Appendix B. The Trial Court's unreported judgment is at page 52, Appendix C. The opinion of the Supreme Court of the State

of Wisconsin entered June 29, 1973, and reported at 60 Wis. 2d 208, 208 N.W. 2d 839 (1973), is reproduced post, pages 1-17, Appendix A. The unreported opinion of the Supreme Court of the State of Wisconsin on petition for rehearing is reproduced post, page 17, Appendix A.

JURISDICTION

The opinions and orders of the Supreme Court of the State of Wisconsin, were filed on June 29, 1973, and August 28, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the Wisconsin Supreme Court err in upholding a state agency's approval of an application to dam and flood tribal lands when the conveyance of these lands to the applicant did not meet the requirements of the Menominee Termination Act and Plan? (See companion petition, *Tomow*).

2. Whether the Wisconsin Supreme Court can abrogate Menominee hunting and fishing treaty rights which were affirmed by this Court in *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968)?

STATUTES INVOLVED

Menominee Termination Act of 1954, as amended, P.L. 83-399 (68 Stat. 250) June 17, 1954, 25 U.S.C. §§891-902, as made effective by Proclamation of the Secretary of the Interior, April 29, 1961, 26 Fed. Reg. 3726. Also Wis. Stat. §31.05, Applications for permits to construct, and Wis. Stat. §31.06, Hearing, are reproduced in Appendix E, post.

STATEMENT OF THE CASE

Introduction

The background facts and many of the transactions involved in this case are identical with Henry L. Tomow, Sr., et al., petitioners v. Menominee Enterprises, Inc., et al., respondents and N. E. Isaacson & Associates, Inc., respondent (*"Tomow"*), which is the subject of the petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin which was filed simultaneously with this case. Insofar as this case involves federal claims identical to those raised in *Tomow* concerning sales of Menominee Indian tribal lands to non-Menominees, the statement of facts in *Tomow* respecting the *historical background* and *the process of termination* is hereby adopted in toto.

Lakes of the Menominees Development[1]

On August 10, 1967, the Menominee Enterprises, Inc. (MEI) Board of Directors, who are elected under the terms of the Menominee Termination Plan by the voting trustees, and the voting trustees jointly passed a resolution authorizing MEI to:

> define economic development zones on its land in Menominee County, Wisconsin, not to exceed 8,750 acres in areas to be defined and described from time to time by the Menominee Common Stock and Voting Trust, and/or the shareholders of the Corporation, whichever then holds the common stock; and . . . that pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc. within such economic development zones warranty deeds may issue as a form of land transfer. . . .

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[1] The following facts are derived from the Wisconsin Supreme Court opinion, Appendix A, pp. 1-17, post, and the circuit court opinion, Appendix B, pp. 18-51, post and the citations given.

Pursuant to this resolution, on July 9, 1968, MEI and N. E. Isaacson & Associates, Inc., a land developer and artificial lake builder, entered into an agreement whereby they established a joint venture to be known as "Lakes of the Menominees" (LOM) for the "purpose of holding, developing and selling to persons including non-Menominees certain lands consisting of 5,170 acres located within the economic development zone. . . ." See companion petition in *Tomow*. The lands within the economic development zone consisted of rich marsh and swamplands, which were particularly suited for tribal hunting and fishing needs. In fact the game and fish of these and similar swamplands provided the inducement for tribal acceptance of the reservation granted in the 1854 Treaty of the Wolf River. See *Menominee Tribe of Indians* v. *United States*, 95 Ct Cl 232, 240-241 (1941).[2] This agreement was given unanimous approval by the voting trustees.

LOM undertook a substantial and extensive land and lake development project known as "Legend Lake." The project called for the creation of three large, artificial lakes to be formed by a system of dams from small, natural lakes and marsh lands, long used by the tribe for hunting and fishing. See 95 Ct. Cl. 232, supra. To complete the project LOM filed an application under Chapter 31 of the Wisconsin Statutes with the Wisconsin Natural Resources Board (Department of Natural Resources or DNR) for a permit to construct, operate and maintain

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[2] These swamplands include those located within Section 23, Township 28N, Range 16E. 95 Ct. Cl. 232, 237. See also Appendix D, p. 60, post, Findings of Fact by the Department of Natural Resources, noting that these lands are included in the present controversy.

a dam in the Linzy Creek outlet of Pywaosit Lake in Menominee County. See Appendix D, p. 54, 59 post. Chapter 31, see Appendix E, post, provides, inter alia:

> 31.05 (1969) Any person, firm, corporation . . . desiring a permit to construct, operate and maintain a dam shall file with the department a written application therefor . . .

The application must include:

> 31.05(3) proof satisfactory to the department that the applicant owns or has an enforceable option to purchase the described dam site and at least 65% of the land to be flowed, or the flowage rights on at least 65% of such land.

Section 31.06, requiring the DNR to hold a hearing concerning the application, also states:

> 31.06(2) . . . the applicant . . . shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing . . .

The applicant had a notice published in the appropriate newspaper. Hearings were held on July 7, 1969, in Madison, and on February 3, 4 and 5, 1970, in Green Bay. Several persons appeared, were heard and recorded as being in favor of the application. Petitioners appeared and opposed the application, arguing that the tribe owned the property involved; that the tribal members had not authorized the project; that they had been deceived; that the Voting Trust had no authority to sell their land; and that their hunting and fishing, as well as other treaty rights, including the ecological preservation of the area, were impaired by the sale and the project. The Depart-

ment of Natural Resources issued findings of facts and conclusions of law. See Appendix D, pp. 54-67 post. Quoting the language of LOM's application, the DNR specifically found, inter alia,

> Par. 5—Menominee Enterprises, Inc., is the owner of the dam site and flowage area. They will deed the property to Lakes of the Menominees.

On September 14, 1970, the permit to construct the dam was issued. See Appendix D, pp. 64-67 post.

History of Litigation

On October 14, 1970, Shirley A. Daly, an enrolled Menominee, seven other enrolled Menominee Indians, and the wife of an enrolled Menominee, filed a petition in the Circuit Court of Dane County, Wisconsin, requesting the court to review and vacate the Department of Natural Resources' order granting the permit to LOM to construct the dam. See Appendix B, p. 19 post. Among other things, petitioners contended that the DNR's finding that LOM was the owner of or had an enforceable option to purchase the dam site and flowage area was contrary to Wisconsin statutes, violated petitioners' federal, constitutional, and treaty rights, and was unsupported by substantial evidence in view of the entire record as submitted.

The petitioners argued that under the Termination Plan, which the Secretary approved, only the tribal members as MEI shareholders could authorize sales of tribal property outside the tribe. Since the record was barren of any evidence showing such tribal approval, the finding was without support. Furthermore, the Termination Act did not amount to Congressional abrogation of Menomi-

nee hunting and fishing treaty rights incorporated in the provision "to be held as Indian lands are held," as found by this court in *Menominee Tribe of Indians* v. *United States,* 391 U.S. 404 (1968). Since these treaty rights continued, petitioners further argued that the transfer of tribal lands were subject to restrictions not normally found on other lands. The lands, granted to the tribe by treaty with the United States, constitute valuable property rights which cannot be taken from the tribe unless they relinquish those rights as set forth in the Termination Act and MEI's Articles of Incorporation. Since the record revealed no evidence showing that they have relinquished those rights, petitioners argued that the Court could not allow DNR's order to thwart Congressional intention to protect their rights. The court rejected petitioners' pleas holding, inter alia, that the statement concerning ownership in LOM's application was sufficient for DNR's finding under §31.05(3), Wis. Statutes. The Circuit Court actually sidestepped the issue by stating MEI's "ability to convey may be and should be raised properly in another forum. If it be there determined that Menominee Enterprises, Inc., . . . has no right to convey . . . that will be the end of [the project]. . ." See Appendix B, p. 30 post, and the *Tomow* petition where this issue is discussed in detail. Regarding treaty rights, the court was "satisfied that the Treaty of Wolf River did not freeze for all time the topography or ecology of the lands and water now embraced within Menominee County." See Appendix B, pp. 31-32 post. The court further found that the hearing was not a "contested" [quasi-judicial] one, therefore, certain due process requirements, such as "reasonable notice" were inapplicable. Nevertheless, the court held that notice was given to all interested parties. See Appendix B, pp. 22-23 post.

On appeal to the Wisconsin Supreme Court, petitioners raised questions of state administrative law as well as questions of federal law. The petitioners sought to establish (1) that the transfer from MEI to LOM of the dam site and flowage area was illegal in that it violated relevant portions of the Menominee Termination Plan, and (2) that the action of DNR in authorizing and granting the permit to create the dam project would result in the flooding of Indian lands valuable for breeding fish and game and therefore would cut them off forever from enjoying their federal treaty rights to hunt and fish on these lands. See Appendix A, pp. 1-17 post. Petitioners further asserted that because all enrolled Menominee held treaty and property interests in the lands affected, failure to notify them by mail of the DNR hearing violated their statutory due process rights.

The Wisconsin Supreme Court in addressing the ownership and notice arguments relied totally on its holding in *Tomow* v. *MEI,* 60 Wis 2d 1 (1973), 208 N.W. 2d 824. See companion petition in *Tomow.* Thus, because title to the land and the right to manage and sell it was in MEI and the Voting Trust, the court rejected petitioners' arguments. See Appendix A, p. 11 post. That court further held that the hearing was "contested" [quasi-judicial] because the appellant Menominees (1) had a legal right as Wisconsin citizens to protect their public right to enjoy navigable waters for recreational purposes, including enjoyment of scenic beauty and (2) an "additional indirect right in the preservation of their hunting and fishing privileges." See Appendix A, p. 10 post. Nevertheless, the court found no due process violations, as it refused to further consider the federal treaty infringement arguments made by petitioners. See Appendix A, p. 10 post. The DNR's order granting the application to construct the dam was affirmed. From the decision of the Wisconsin Supreme Court the petitioners seek certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. THE WISCONSIN SUPREME COURT RELIED EXCLUSIVELY ON ITS ERRONEOUS DECISION IN TOMOW v. MEI IN DETERMINING THE VALIDITY OF TRIBAL LAND SALES BY MEI TO THE LOM JOINT VENTURE, AND, HENCE, ITS DETERMINATION AS TO OWNERSHIP OF THE LANDS TO BE FLOODED IS ALSO ERRONEOUS.

The Wisconsin Supreme Court's affirmation of the Department of Natural Resources finding that LOM owned or had an enforceable option to purchase the dam site and flowage areas is based entirely on that Court's erroneous decision in *Tomow* v. *MEI*. See the companion *Tomow* petition for certiorari. The *Tomow* decision as applied here by the Wisconsin Supreme Court ratifies the conveyance by seven people, three of whom were non-Menominees, of tribal lands to a joint venture consisting of MEI and N. E. Isaacson, a non-Menominee developer, to be re-sold to non-Menominees. It also ratifies the decision of the State's Department of Natural Resources to grant the LOM joint-venturers a dam construction permit after a hearing without notification to members of the Menominee Tribe. In addition, it permits that developer to destroy natural lakes and marshlands which will irreparably injure tribal hunting and fishing rights which were granted to the Menominee Tribe in the Wolf River Treaty of 1854 and affirmed by the Court of Claims in *Menominee Tribe* v. *U.S.*, 95 Ct Cl 232 (1941) and this Court in *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968).

Certiorari should be granted because the *Tomow* decision is erroneous, and because its application here violates: (a) the Termination Plan, including MEI's Articles of Incorporation, a federal document entered pursuant to Congressional mandate and approved by the Secretary of the Interior, (b) petitioners' rights to due process of law, and (c) petitioners' treaty rights.

The Wisconsin Supreme Court's failure to apply Indian law principles in its construction of the Termination Act and Plan has been raised and fully argued in the related petition for certiorari in *Tomow*. Since the transactions as well as the issues of Indian law involved in *Tomow* are identical with the objections of petitioners in this case respecting the sale of lands by MEI to LOM, and hence, the DNR's finding as to ownership of the land to be flooded by the dam, petitioners refer the Court to the companion *Tomow* petition with respect to this federal issue.

B. BY UPHOLDING THE PERMIT GRANTED BY THE DNR TO LOM, THE WISCONSIN SUPREME COURT HAS ABROGATED MENOMINEE HUNTING AND FISHING TREATY RIGHTS WHICH THIS COURT HELD SURVIVED TERMINATION IN MENOMINEE TRIBE v. U.S., 391 U.S. 404 (1968).

1. By acknowledging petitioners treaty claims but then upholding the grant of the dam permit, the Wisconsin Supreme Court has ignored the express ruling of this Court in Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

In 1968 this Court granted a Writ of Certiorari to determine whether certain hunting and fishing treaty rights reserved to the Menominee tribe by the Treaty of Wolf

River in 1854 were abrogated by an Act of Congress, the Menominee Termination Act, 25 U.S.C. §891 et seq. This Court resolved the conflict between the state court, the Wisconsin Supreme Court, which had ruled that the Indian rights no longer survived, and the federal court, the United States Court of Claims, which had ruled that since the Menominee Termination Act did not include specific Congressional language abrogating the Menominee treaty rights to hunt and fish, the rights survived. This Court affirmed the ruling of the United States Court of Claims. See *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968). Now, five years later, petitioners once again request this Court to reverse a determination by the Wisconsin Supreme Court which impairs and infringes Menominee hunting and fishing treaty rights.

The Wisconsin Supreme Court's decision permits Menominee treaty rights to hunt and fish to be modified and abrogated by non-Menominees with the consent and approval of the State of Wisconsin but without the consent and approval of the Menominee People or Congress. The dam permit authorized LOM to flood valuable Indian swamplands which the tribe had specifically chosen for its rich variety of hunting and fishing. See *Menominee Tribe of Indians* v. *United States*, 95 Ct Cl 232, 240-241 (1941). The flooding irreparably altered the area's swampy ecology, which fostered the breeding and spawning of game and fish. Further, tribal lands sold to non-Menominees were, in effect, removed from the Menominee hunting and fishing domain. This state action infringing the acknowledged federal treaty rights of Menominee tribal members is a direct assault on this Court's ruling in *Menominee Tribe of Indians* v. *United States*,

supra, for in that case this Court ruled that petitioners' treaty hunting and fishing rights survived Termination, since only Congress can abrogate or modify a treaty right, and that Congress had not abrogated any such rights in terminating the federal supervision of the Menominee tribe.

2. Approval of the construction of the dam to create the artificial Legend Lake by the DNR violated the Supremacy Clause of the United States Constitution.

The Constitution makes the treaties of the United States the supreme law of the land and specifies that they are binding as to the states. Article VI of the United States Constitution says in pertinent part:

> [That] all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Treaties with Indian tribes are of the same dignity as treaties with foreign nations, the Supremacy Clause being equally applicable to both. *U.S.* v. *43 Gallons of Whiskey,* 93 U.S. (3 Otto) 188 (1876); *Worcester* v. *Georgia,* 31 U.S. (6 Pet) 515 (1832); F. Cohen, Handbook of Federal Indian Law, 33-34. Any state law, regulation or practice which is inconsistent with the treaties involved is necessarily ineffective as violative of the Constitution. The language and the intent of the treaties must prevail. *See,* e.g., *Menominee Tribe of Indians* v. *United States, supra; Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968), *reh den* 393 U.S. 898 (1968); *Tulee* v. *Wash-*

ington, 315 U.S. 681 (1942); *Worcester* v. *Georgia, supra.* This Court cannot allow the Wisconsin Supreme Court and a state agency to impair Menominee treaty rights in violation of the Supremacy Clause.

3. The acts of the DNR in granting a permit to construct the dam to create the artificial Legend Lake upon the contested Indian lands violates Public Law 280, a Congressional statute which provides explicit protections for Indian hunting and fishing rights.

It is a cardinal principle of Indian law that Congressional power in the area of Indian affairs is plenary. *Worcester* v. *Georgia,* 31 U.S. (6 Pet) 515 (1832); *McClanahan* v. *State Tax Commission,* 411 U.S. 164 (1973). State law may not infringe upon an activity protected by federal law. *See, e.g. U.S.* v. *Kagama,* 118 U.S. 375 (1885); *Rice* v. *Olson,* 324 U.S. 786, 789 (1949); *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965). Congress has exhibited a conservative attitude toward the extension of state power over Indian affairs. *Kennerly* v. *District Court of Montana,* 400 U.S. 423 (1971).

Protection of rights secured to Indians under federal treaties is an area in which there is a substantial federal interest. To be sure, Congress has dealt jealously with the question of allowing states to extend their jurisdiction over treaty-secured Indian hunting and fishing rights. Thus, the general statute, Public Law 280, 18 U.S.C. §1162, 28 U.S.C. §1360, 67 Stat. 588, as amended, which provides for the assumption of Wisconsin State civil and criminal jurisdiction over Indians, specifically protects their hunting and fishing rights:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty, agreement or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

As this Court indicated in *Menominee Tribe of Indians* v. *United States, supra:*

> That provision on its face contains no limitation; it protects any hunting, trapping, or fishing right granted by a federal treaty. 391 U.S. at 411.

This Court considered Public Law 280 *in pari materia* with the Termination Act when it concluded that "the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act." 391 U.S. at 411.

The Circuit Court in the instant case attempted to avoid the federal mandate of Public Law 280. By holding "that the Treaty of the Wolf River did not freeze for all time the topography or ecology of [the lands here in issue]," the court permitted the DNR to authorize the permanent alteration of the ecology by flooding the rich swamplands the tribe had specifically chosen for its good hunting and fishing opportunities. The issue is not, however, whether or not the topography or ecology of the lands is frozen for all times, but whether or not the use of the land may, in effect, abrogate hunting and fishing rights secured by treaty. Here, the flooding of the lands by LOM destroys the fish spawning areas as well as the Menominee rights to hunt on those lands in violation of Public Law 280. The Wisconsin Supreme Court ignored completely the existence of Public Law 280.

4. The acts of the DNR in granting a permit to construct the dam to create the artificial Legend Lake on contested Indian lands violates Menominee hunting and fishing rights protected by the decisions of this Court.

On numerous occasions this Court has had an opportunity to protect the exercise of Indian treaty rights of hunting and fishing from infringement by both state and private parties. The issue has often centered not upon whether or not the Indians owned the land but whether or not the treaty right existed thereon. In *Menominee Tribe of Indians* v. *United States, supra,* this Court determined that treaty hunting and fishing rights continued to exist on the lands here involved after Termination. Regardless of ownership, neither private individuals nor state governments can prevent Indian access to these lands for the purpose of exercising their hunting and fishing rights because such lands are restricted by servitudes and easements for the benefit of the Indians. See *United States* v. *Winans,* 198 U.S. 371 (1905); *Seufert Brothers Co.* v. *United States,* 249 U.S. 194 (1918); *State* v. *McClure,* 127 Mont. 534, 268 P 2d 629 (1954). Compare also *Mattz* v. *Arnett,* ..... U.S. ....., 37 L Ed 2d 92 (1973). The flooding of the lands here involved, however, by LOM under authorization from the State of Wisconsin, amounts to the very type of prevention of access prohibited by the decisions of the above cited cases.

These cases provide ample precedent to demonstrate the great lengths which this Court has taken to assure that once treaty rights have been reserved for Indian people, they shall not be abridged or modified by subsequent actions of private individuals or state officials.

C. THE PROCESS BY WHICH THE DNR AFFORDED THE PARTIES AN OPPORTUNITY TO BE HEARD FAILED TO PROVIDE ENROLLED MENOMINEE INDIANS WITH NOTICE OF THE HEARING IN VIOLATION OF WISCONSIN STATE LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The Wisconsin Supreme Court held that notice of the DNR hearing was required but that each enrolled Menominee need not have been personally notified. However, Wis. Stat. 31.06(2) requires that every person with an interest in the lands to be affected by the dam must be provided personal notice of the DNR hearing. Furthermore, the hearing itself was quasi-judicial in nature thereby requiring notice be given to interested parties. (The Wisconsin Supreme Court held that the hearing was "contested," the Wisconsin statutory definition of quasi-judicial. See Appendix A, p. 10 post. *See also* Wis. Stat. §§227.01(2), 227.07.) See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Groppi* v. *Leslie*, 404 U.S. 496, 502-503 (1972). The Due Process Clause of the 14th Amendment at a minimum requires that deprivation of property by an adjudicatory process be preceded by notice reasonably calculated to apprise interested parties of the pendency of the action in order to afford them an opportunity to be heard. The Wisconsin Supreme Court recognized that enrolled Menominees had hunting and fishing rights but that because the Voting Trust had the power to sell the land, individual Menominee did not have sufficient personal interest so as to entitle them to personal notice. See Appendix A, p. 10 post.

Regardless of the Voting Trust's power to authorize land sales to non-Menominees, this Court determined in 1968 that the tribe, which continued to exist following termination, *Menominee Tribe* v. *United States*, 179 Ct Cl 496, 500 (1967), retained hunting and fishing treaty rights. 391 U.S. 404. These treaty rights, fundamental to Menominee life style, conferred on enrolled Menominee tribal members property interests in the former reservation lands which include the natural lakes, swamplands and surrounding forests that are the subject of this law suit. Thus, each enrolled Menominee had a property interest in the lands affected by the Legend Lake project. Each was therefore entitled to personal notice as provided by Wisconsin statute and Constitutional due process requirements for quasi-judicial hearings and proceedings. Failure to provide each enrolled Menominee with personal notice of the hearing concerning the permit to construct the dam grossly deprived the Menominees of an opportunity to be heard and defend their tribal property right to hunt and to fish these rich lands. The effect of the Wisconsin Supreme Court's approval of this procedure constitutes a backhanded way of abrogating the Menominee hunting and fishing rights.

Furthermore, the members of the Menominee Tribe, not the Voting Trust, retained the power to authorize land sales to non-Menominees. See companion *Tomow* petition. As a result each enrolled Menominee held a special interest in the lands affected which was guaranteed by the Menominee Termination Act and Plan, thereby entitling each individual to a statutory and constitutional right to notice of the administrative hearing. The Wisconsin Supreme Court's reliance on the fact that the petitioners appeared in opposition, does not cure the failure of notice to all the tribal members, who might then have marshalled enough support to prevent the dam permit from being issued.

D. THE WISCONSIN SUPREME COURT'S DECISION, IF ALLOWED TO STAND BY THIS COURT, WILL CONSTITUTE A LEGAL PRECEDENT HARMFUL TO NOT ONLY THE MENOMINEE BUT TO ALL AMERICAN INDIANS.

American Indians have continuously conducted an oftentimes losing battle to retain ownership of their tribal lands and to protect their hunting and fishing treaty rights which are integrally connected with the preservation of the natural ecology of their lands. The Wisconsin Supreme Court's decision seriously threatens the Menominee Tribe's and all American Indians' chances for successfully retaining that which is theirs.

The effects of the Wisconsin Supreme Court's decision regarding Indian land sales to non-Menominees and construction of federal Indian documents are identical to those discussed in the related *Tomow* petition and are not here repeated.

Only Congress may abrogate Indian treaty rights. The Wisconsin Supreme Court has, however, in this case, abrogated Menominee treaty hunting and fishing rights on the lands affected by the flooding. The Wisconsin court's decision encourages state governments to surreptitiously abrogate Indian hunting and fishing rights. That court's acknowledgement of petitioners' treaty rights and subsequent ignoring of them in affirming the grant of the permit, constitutes a blatant disregard for federal treaties with Indian tribes, decisions of this Court, and basic due process principles of fair notice and hearing. Indians should not be dependent on newspaper notice in order to defend treaty rights before state agencies.

Furthermore, state agencies will be able to cite the Wisconsin decision for support whenever they wish to alter the topography and ecology of Indian lands without providing notice and an opportunity for the Indian owners to be heard on the effects such actions might have on hunting and fishing treaty rights. Thus, American Indians would no longer be able to rely on their treaties with the federal government, nor for that matter on constitutional due process rights, nor on the decisions of this Court, to protect their interests, because states will be able to abrogate indirectly, by procedures altering topography and ecology, treaty rights which they cannot abrogate directly.

Regarding state actions effecting the topography and ecology of Indian lands, it is important to note that the topography and ecology are not only important to the preservation of Indian hunting and treaty rights but are also crucial to the Indian view of land. To the Menominees and most American Indians, the earth is deemed to be the Mother from which all living things emerge. Its ecological preservation is nothing less than a religious obligation. The laws of the United States and the several states should help, not hinder, threatened cultures.

CONCLUSION

The petition should be granted for the above reasons and those stated in the companion petition in the case entitled *Tomaw* v. *MEI et al and N. E. Isaacson.*

Respectfully submitted,

Joseph F. Preloznik
Mary Van Gemert
Counsel for Petitioners